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In the Supreme Court of the United States

OCTOBER TERM, 1982

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2
and EAST JEFFERSON HOSPITAL BOARD,

PETITIONERS

versus

DR. EDWIN G. HYDE,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF
ON BEHALF OF THE RESPONDENT

HENRY B. ALSOBROOK, JR.
FRANK M. ADKINS
RICHARD B. EASON, II
Adams and Reese
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234

Counsel for Amicus Curiae
Louisiana State Medical Society

A B Letter Service, Inc., 327 Charters St., New Orleans, La. (504) 581-6555

QUESTIONS PRESENTED

1.

Whether an exclusive contract between a public hospital and an independent professional corporation of anesthesiologists which establishes a closed shop as to outside anesthesiologists and which compels users of the hospital's surgical facilities to retain the anesthesia services of the corporation *CREATES A TYING ARRANGEMENT THAT IS ILLEGAL PER SE UNDER THE SHERMAN ANTITRUST ACT.*

2.

Whether an exclusive agreement between an independent professional corporation of anesthesiologists and a public hospital which compels users of the hospital's surgical facilities to retain the anesthesia services of the corporation and which establishes a closed shop as to outside anesthesiologists, *CREATES AN "UNREASONABLE" RESTRAINT OF TRADE.*

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JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on September 20, 1982. The petition for a writ of certiorari was filed on December 17, 1982, and granted on March 7, 1983. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

INTEREST OF THE AMICUS CURIAE

The Louisiana State Medical Society, as amicus curiae, files this brief in support of the position submitted

by Dr. Edwin Hyde. A similar action was taken by this amicus curiae in this matter when it was before the United States Court of Appeals for the Fifth Circuit. This amicus curiae strongly believes in the principles of free competition for all of the members of the Society and all doctors everywhere. Under the circumstances before the Court, the competitive interests of the members of the Society as well as other health care providers have been severely restrained by the exclusive contract and closed shop atmosphere between the public hospital and the independent professional corporation of anesthesiologists.

STATEMENT OF THE CASE

On July 14, 1977, Dr. Edwin G. Hyde submitted an application for medical staff privileges in the Department of Anesthesiology at East Jefferson General Hospital. (This medical facility was built with public funds from both the state and federal government.) As Dr. Hyde's application weaved its way through the bureaucratic process, it was approved at every level including an affirmative finding by the medical staff. However, when the application reached the final level on October 18, 1977, it was rejected by the Board of Directors of the hospital. Dr. Hyde received notice of the Board's decision by letter which indicated that his application had been rejected because of the exclusive nature of a contract in existence between the hospital and a group of anesthesiologists known as Roux & Associates. Under this contract, a "closed shop" was in effect at the hospital, that is, an anesthesiologist who was not a member of the group of Roux & Associates was not permitted to contract with the hospital to provide anesthesiological services. Though a physician such as Dr. Hyde had qualifications equal to those members of Roux & Associates, he was not allowed to practice his profession

simply because of this exclusive contract with the anesthesiological group.

As a result of the foregoing circumstances, an action was brought by the respondent, Dr. Edwin Hyde, for declaratory and injunctive relief against the hospital regarding his exclusion from the medical staff at the hospital. Dr. Hyde requested the district court to declare that his exclusion from the medical staff was illegal. The respondent's primary basis for this action was his contention that Section 1 of the Sherman Antitrust Act was violated. Dr. Hyde contended that the Sherman Act had been violated as there was a per se illegal tying arrangement in that users of the hospital's surgical facilities (the tying product) were compelled to purchase anesthesia services (the tied product) from Roux & Associates. Furthermore, Dr. Hyde contended that there were unreasonable restraints of trade present as a result of this exclusive contractual arrangement. Additionally, Dr. Hyde sought issuance of an injunction requiring the defendants to appoint him to the medical staff of East Jefferson Hospital.

Upon trial of this matter, the district court entered judgment dismissing the claim brought by Dr. Hyde. See *Hyde v. Jefferson Parish Hospital District No. 2*, 513 F.Supp. 532 (E.D. La. 1981). On appeal, the United States Fifth Circuit reversed the district court's judgment and found that there was a violation of Section 1 of the Sherman Act as the exclusive contract between Roux & Associates and the hospital created a tying arrangement that was illegal per se. See *Hyde v. Jefferson Parish Hospital District No. 2*, 686 F.2d 286 (5th Cir. 1982).

The amicus curiae adopts the remainder of the statement of the case of the respondent as per Rule 36.5 of the

Rules of the United States Supreme Court.

SUMMARY OF THE ARGUMENT

A. The East Jefferson General Hospital is a public hospital as it was built with public tax dollars and as such, it should be open to all citizens whether they be patients or physicians. Considering the public nature of the hospital, any form of a closed shop would clearly be an unreasonable restraint of trade. Aside from the general consideration of the preservation of competition, an equally important concern should be the quality of health care that is provided to the respective patients of the hospital. The decline in health care which results from the exclusive contract arrangement is one of the anti-competitive effects of the exclusive contract arrangement between the hospital and the anesthesiological group.

B. The exclusive contract arrangement between the hospital and the anesthesiological group is a tying arrangement that is illegal per se. There are two separate products involved in this matter, with the hospital's surgical facilities as the tying product and the anesthesia services as the tied product. The relevant geographical market for consideration is the Eastbank of Jefferson Parish. The market power possessed by East Jefferson Hospital is clearly sufficient to coerce the purchase of anesthesia services by perspective patients which is reflected by the power of the medical facility to raise prices and otherwise impose burdensome terms. The arrangement with which we are concerned affects a substantial amount of interstate commerce as it involves the use of federal funds, supplies from out of state manufacturers and treatment to out of state patients. The illegal tying arrangement creates numerous anti-competitive effects including the preclusion

of other anesthesiologists from practicing at a public hospital, the denial of the freedom of choice of a patient or surgeon to select an anesthesiologist, the imposition of artificial prices, and a decline in the quality of health care.

C. Professional services are subject to Sherman Act scrutiny so long as the particular activity involves business or economic concerns. The tying arrangement in this matter can only be regarded as business oriented or economical in nature.

D. Under the rule of reason we must consider whether the restraint involved merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. There are numerous anti-competitive effects which result from the exclusive contract between the hospital and the anesthesiological group which create an unreasonable restraint on competition for anesthesiological services.

ARGUMENT

A. *POLICY STATEMENT:*

A discussion of the purpose of the Sherman Act was stated by this Honorable Court in *Northern Pacific Railway Company v. United States,* 356 U.S. 1, 2 L.Ed.2d 545, 78 S.Ct. 514 (1958). This Court stated:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality

> and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by this Act is competition. And to this end it prohibits, "every contract, combination... or conspiracy, in restraint of trade or commerce among the several states." 356 U.S. at p. 4.

The East Jefferson General Hospital is a public hospital as it was built with public funds from both the state and federal government. As such, all citizens should have the opportunity to use this facility and select their physicians whether they be cardiologists, neurologists, anesthesiologists or any other independent provider of health care. Moreover, any qualified physician should have the opportunity to use such a public facility regardless of the political ties that he or she may have with the authority operating the hospital. Anything short of an open shop is clearly an unreasonable restraint on competition and a threat to the "highest quality" of medical care. To permit the present situation at East Jefferson General Hospital to continue would violate the fundamental goals and ideals set forth by the Sherman Act. Furthermore, to permit the use of a public hospital built with public tax dollars by a limited and chosen few creates an environment which is not "conducive to the preservation of our democratic, political and social institutions."

Aside from the broader considerations of the preservation of competition, is the equally important concern for the quality of the health care that is provided to the respective patients of the hospital. It is clear that the exclusionary contract in effect at East Jefferson has a direct bearing on the physical well-being of the patients of the

hospital, including situations which involve life and death. The concern is the easily distinguishable converse of the numerous antitrust cases which involve automobile motors and tires, razors and blades, chicken franchises and accessories, computors and computor cards, salt and salt dispensers, and the like.[1] Careful scrutiny should be given to cases which involve health care just as special scrutiny is given to certain classes under the Equal Protection Clause of the 14 Amendment. The evidence shows a clear anti-competitive effect on the quality of health care at East Jefferson General Hospital. It is significantly reduced because of the exclusive contract agreement between the public hospital and the independent professional corporation of anesthesiologists.

The effect of permitting the anti-competitive restraints imposed by the exclusionary contract is to legitimize steps toward a total elimination of the freedom of choice by a patient as to health care. Under the present circumstances, wherein a typical hospital has an exclusive agreement with a group of physicians for each department, the patient has no choice as to who will administer treatment to him.[2] In effect, the only freedom of choice that remains is the selection of a hospital, a choice often dictated by the primary physician treating the patient. Upon making such a selection, the hospital dictates all aspects of an individual's health care, including his selection of additional independent physicians. The result is that the

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[1] See *Siegel v. Chicken Delight*, 448 F.2d 43 (9th Cir. 1971); *International Business Machines Corporation v. United States*, 291 U.S. 131 (1936); *International Salt Company v. United States*, 332 U.S. 392 (1947); *United States v. Jerald Electronics Corporation*, 187 F.Supp. 545 (E.D. Penn. 1960), *aff'd procuriam*, 365 U.S. 567 (1961).

[2] Both lower courts made specific reference that exclusive contracts exist for almost all medical departments in an average hospital.

hospital escapes responsibility for the selection of the anesthesiologist, but retains economic and managerial control through a tied contract. Ultimately the patient must forego the selection of his physicians to obtain the services of his selected hospital or the one which his primary physician practices.

B. *THE EXCLUSIVE CONTRACT IS A TYING ARRANGEMENT THAT IS ILLEGAL PER SE*

Section 1 of the Sherman Act (15 U.S. § 1) declares that "every contract, combination, ... or conspiracy in restraint of trade among the several states ... is hereby declared to be illegal." Certain agreements or practices which because of their pernicious effect on competition and lack of redeeming virtue have been deemed illegal per se. *Northern Pacific Railway Company v. U.S.*, 356 U.S. 1, 5, 78 S.Ct. 514, 518 (1958). Under Section 1 of the Sherman Act, tying arrangements are illegal per se whenever the appropriate factors or requirements are satisfied. A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different or tied product or at least agrees that he will not purchase the product from any other supplier. See: *Northern Pacific Railway Company, supra.*

There are certain requirements that must be considered when determining whether a tying arrangement is illegal. These characteristics are:

1. Two separate products, the tying product and the tied product;

2. Sufficient market power in the tying market to coerce purchase of the tied product;

3. Involvement of a not insubstantial amount of interstate commerce in the tied market; and

4. Anti-competitive effects in the tied market.

See, *Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033 (5th Cir. 1981); *Bogus v. American Speech & Hearing Association*, 582 F.2d 277 (3rd Cir. 1978); *Driskell v. Dallas Cowboys' Football Club*, 498 F.2d 321 (5th Cir. 1974). Other courts have required only the first three requirements listed above. See, *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971). If all of these characteristics are satisfied then the tying arrangement is illegal per se without showing an unreasonable restraint of trade. *International Salt Company v. United States*, 332 U.S. 392, 92 L.Ed. 20 (1947); *Hirsch v. Martindale Hubble*, 674 F.2d 1343 (9th Cir. 1982). Moreover, if a plaintiff satisfies these requirements then there is no "necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable —an inquiry so often wholly fruitless when undertaken." *Northern Pacific Railway Company v. U.S.*, 356 U.S. 1, 5, 78 S.Ct. 514, 518 (1958).

The primary purpose for regarding certain tying arrangements as illegal per se was succinctly stated in *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1970). The Court stated:

> The hallmark of a tie-in is that it denies competitors free access to the tied product market, not because the party imposing the arrangement has a superior product in that market, but because of the power or leverage exerted by the

tying product. Rules governing the tying arrangements are designed to strike, not at the mere coupling of physically separable objects, but rather at the use of a dominant desired product to compel the purchse of a second, distinct commodity. *Times-Picayune Publishing Company v. United States*, 345 U.S. 614, 73 S.Ct. 872, 97 L.Ed. 1277. In effect, the forced purchse of the second, tied product is a price exacted for the purchase of the dominant, tying product. By shedding competitors out of the tied product market, tying arrangements serve hardly any purpose other than the suppression of competition. *Standard Oil Company v. United States*, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371 (1949). 448 F.2d at p. 47.

In *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982), this Honorable Court indicated that the rules of per se illegality are applicable to the health care industry. Any argument to the contrary is unfounded.

1. *THE PRESENCE OF TWO SEPARATE PRODUCTS:*

At the outset of every tying case, there is the problem of determining whether two products are in fact involved. *Fortner Enterprises, Inc. v. United States Steel Corporation*, 394 U.S. 495, 507, 89 S.Ct. 1252, 1260, 22 L.Ed. 495 (Fortner 1). In determining whether an aggregation of items constitutes one or more products for antitrust purposes, we must look to the function of the aggregation. *Hirsch v. Martindale Hubble, Inc.*, 674 F.2d 1343 (9th Cir. 1982). This necessarily requires an inquiry into the nature of the relationship between the alleged tying product and the alleged tied product. See *Krehl v. Baskin-Robbins Ice*

Cream Company, 664 F.2d 1348, 1353.

In the matter before the Court, it is indisputable that not only one, but two tying arrangements were established by the exclusive contract entered into by Roux & Associates and the hospital. The first tying arrangement is that as a condition for the use of the hospital's surgical facilities (the tying product), a patient is compelled to agree to purchase the anesthesia services of Roux & Associates (the tied product). A second tying arrangement exists in that as a condition for the provision of anesthesia services by a member of Roux & Associates (the tying product), a person is compelled to agree to use and pay for the provision of the hospital's surgical facility (the tied product). It is these tying arrangements established by the contract which has injured the respondent and which affects the amicus curiae by restraining competition between its members.

It is clear that there are two separate products here. The director of the hospital testified that approximately 875 operations are performed on a monthly basis or about 10,00 surgieries per year. (R-513 F.S. at 538). In each case, a separate fee is charged for the anesthesia services that are provided during these surgeries, apart from the fees that are charged for the use of the hospital's surgical facilities.[3]

Therefore, it is clear that two separate products are present, one in the form of anesthesia services, and the

[3] If we were to view these circumstances from a financial standpoint, then we should consider that it is likely that gross fees in excess of $1,000,000 are collected by the hospital on an annual basis for the anesthesiological services made available by the hospital to its perspective patients. This figure is reached if we consider that a minimum of $100 in fees is charged for anesthesiological services associated with each surgery.

other in the form of surgical facilities. Additionally, these products are furnished by two completely different entities, Roux & Associates and the hospital, respectively.

2. *SUFFICIENT MARKET POWER*

a) *THE APPROPRIATE GEOGRAPHIC MARKET*

The second requirement which must be satisfied in order to establish a tying arrangement that is illegal per se is that the seller must possess sufficient economic power in the market of the tying product to coerce purchase of the tied product. *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). The first determination that must be made with respect to this requirement is the relevant geographic market.

In reviewing the opinions of the lower courts, it is clear that there is a disagreement as to the relevant geographic market.[4] The district court's finding regarding the relevant geographic market was as follows:

> A relevant geographic market is the market in which the seller operates and to which the purchaser can practically turn for supplies. The evidence showed that 70% of the patients from the Eastbank of Jefferson Parish go to hospitals in the Metropolitan-New Orleans area other than

[4] The Metropolitan-New Orleans area consists of three parishes (counties) including Orleans, Jefferson and St. Bernard. Jefferson Parish is divided into what is commonly referred to as the Eastbank, which represents all citizens who reside in the parish on the eastern side of the Mississippi River, and the Westbank, which represents all citizens who reside in the parish on the western side of the Mississippi River. East Jefferson Hospital is located on the Eastbank of Jefferson Parish.

> East Jefferson. The data presented by the New Orleans area Bayou-River Parish system shows large numbers of Jefferson residents go to hospitals in the New Orleans area such as Mercy, Baptist and Touro Hospitals and Hotel Dieu. Therefore, plaintiff must show that East Jefferson dominated the market which at least includes the Orleans Parish hospitals which are located on the Eastbank. (R-Record on Appeal, Vol. II, at 246-247).

The district court in making such a conclusion, failed to make the crucial determination it had set out to do. To repeat again, the court was required to determine the geographic market in which the hospital competes for the provision of surgical facilities (the tying product). The data which showed that 70% of the patients from the Eastbank of Jefferson Parish go to hospitals in the Metropolitan-Orleans area other than East Jefferson was incomplete because at various times certain hospitals did not participate in the surveys. (R-513 F.S. at 539). Additionally, and more importantly, there was no information with regard to which patients had surgery. It is inconceivable to imagine how the district court concluded that the relevant geographic market in which the hospital competes for the provision of surgical facilities was the Metropolitan-Orleans area based upon the evidence presented.

As an example, one could state that while 70% of the residents of the Eastbank of Jefferson Parish go to Metropolitan-Orleans area hospitals other than East Jefferson, not one out of that group did so for the purpose of using the surgical facilities. To phrase this another way, only 30% of the residents of Eastbank of Jefferson Parish are in need of surgical facilities, and all of them go to East Jefferson Hospital.

While the above example is extreme, it merely points out the error made by the district court in failing to keep in mind the specific product (surgical facilities), so crucial to any market definition in antitrust analysis.

To the contrary, the Court of Appeal determined that the relevant geographic market was the Eastbank of Jefferson Parish. (R-686 F.2d at 291). We believe that this determination is the accurate one for several reasons. The plain and simple truth here is that the majority of potential patients chose a hospital that is closest to their home. Even the district court recognized this fact when it stated:

> It is likely that any individual will chose to go to a hospital closest to his home if it is possible to do so for the convenience of the family. Persons living nearer to hospitals in other areas will chose to go to these hospitals if possible. (R-Record on Appeal, Vol. II, at 247-248).

A second reason here is that patients do not chose a hospital based on the price of the services. This is due in part to the fact that the large majority of hospital bills are paid by third-party insurers. (R-686 F.2d at 290). Moreover, price lists for services are not readily available for the consumer to scrutinize. A third reason is that one-third of all of the patients from the East Jefferson area go to East Jefferson Hospital, the only public hospital on the Eastbank of Jefferson Parish. (R-686 F.2d at 291). Finally, the hospital is operated by a "hospital service district" pursuant to LSA-R.S. 46:1051, *et seq.* The district which the hospital serves includes only the Eastbank of Jefferson Parish. The hospital board is directed by LSA-R.S. 46:1055 "to represent the public interest in providing hospital and medical care *in the district.*" Thus, by law, the hospital's

primary purpose is to serve the residents of the Eastbank of Jefferson Parish. Although the hospital may, by necessity or by choice, also treat residents of other areas, its primary market area is limited by law to the Eastbank of Jefferson Parish.

Based on the foregoing, we urge this Court to view the relevant geographic market as the Eastbank of Jefferson Parish as opposed to the Metropolitan-New Orleans area. The overall facts abundantly support this finding as discussed above.

b) *ACTUAL MARKET POWER*

The second consideration with regard to this requirement for an illegal tying arrangement is whether the market power possessed by East Jefferson Hospital is sufficient to coerce the purchase of the tied product. In *Fortner Enterprises, Inc. v. United States Steel Corporation*, 394 U.S. 495, 502, 89 S.Ct. 1252, 22 L.Ed. 495 (1969), this Court discussed the showing of sufficient economic power as follows:

> "A standard of sufficient economic power does not, as the district court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tying cases have made unmistakeably clear that the economic power over the tying product *can be sufficient even though the power falls far short of the dominance and even though the power exists only with respect to some of the buyers in the market.*
>
> ...
>
> Accordingly, the proper focus of concern is whether the seller has the power to raise prices,

> or impose other burdensome terms such as a tie-in, with respect to any appreciable numbers of buyers within the market."

This position was followed by this Court in *U.S. Steel Corporation v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977)-Fortner II.

Because a significant number of surgical patients in the hospital's geographic area will select East Jefferson Hospital without regard to price or at the direction of their surgeon, the hospital anesthesiological group is free to impose prices free of competitive restraints. The result extinguishes competition in both cost and quality. This result is clearly demonstrated by the fact that patients at East Jefferson pay anesthesia fees based on the fee rate of anesthesiologists although most of the work is performed by nurse anesthetists. (R-686 F.2d at 291). Based on the foregoing, we submit that the standard (Fortner 1) set forth for this requirement has been satisfied as the hospital has the power to impose burdensome terms and raise prices, and further that this has taken place under the exclusive contract.

3. *INVOLVEMENT OF A NOT INSUBSTANTIAL AMOUNT IN INTERSTATE COMMERCE*

In *U.S. v. Frankfort Distillers*, 324 U.S. 293, 297, 89 L.Ed. 951 (1945), this Court discussed the third requirement necessary to establish a tying arrangement as illegal per se. Recall that this requirement is that the tying arrangement must involve a not insubstantial amount of interstate commerce in the tying market. In *U.S. v. Frankfort Distillers, supra*, the Court stated: "There is an

obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states." Hence, the tying arrangement must affect commerce among the states.

In *Goldfarb v. Virginia State Bar Association*, 421 U.S. 773, 44 L.Ed.2d 572 (1975), a challenge was brought by the claimant as to the minimum fee schedules set by the bar association and adhered to by practitioners concerning title searches in connection with the purchase of real estate. The claimant submitted that this practice was a violation of the Sherman Act. When considering the third requirement for establishing an illegal tying arrangement per se, the Court held that the effect of this practice on interstate commerce was substantial as many of the loans for the purchse of homes involved funds from federal agenceis such as the Veterans Administration and Housing and Urban Development.

In the case before the Court, it is overwhelmingly clear that a substantial amount of interstate commerce is affected by the tying arrangement between the hospital's surgical facilities and the anesthesia services. The evidence establishes that:

1. Anesthesia medicines and other surgical supplies are purchased from out of state suppliers;

2. Many of the patients' bills for anesthesia services and hospital care are paid by federal medicare and medicaid benefits as well as foreign insurance companies; and

3. A significant percentage of the patients who

require anesthesia services and hospital care are from out of state. (R-513) F.S. at 540).

Both of the lower courts were in agreement that this requirement was satisfied.

4. *ANTI-COMPETITIVE EFFECTS IN THE TIED MARKET*

The final requirement for establishing an illegal tying arrangement concerns the existence of anti-competitive effects in the tied market. We contend that there are numerous anti-competitive effects which overwhelmingly indicate that this last factor has been satisfied.

Initially, the exclusive contract between the hospital and Roux & Associates precludes any other anesthesiologist in the New Orleans area or for that matter in the country from practicing his profession at a public hospital that was built with taxpayer dollars. The reverse of this point is that only four anesthesiologists are permitted to practice this branch of medicine at the hospital. Hence, the freedom of choice of an anesthesiologist outside of the group to practice in a public hospital is denied. This is a significant restraint upon the rights of those who practice this profession.

The net effect of this closed shop arrangement is to create a lack of competition within the hospital which will discourage the anesthesiological group with the exclusive contract from improving or initiating new techniques and procedure. (R-513 F.S. at 539). This was the view of Dr. John Andriani, who is a practicing anesthesiologist of some 40 years, and who testified at trial. Dr. Andriani further testified that this closed system

discourages anesthesiologists from coming to New Orleans and medical students from entering the field because of a lack of positions in the area. (R-513 F.S. at 539). Additionally, there was other testimony at trial that this arrangement caused the hospital to hire nurse anesthetists in place of much needed anesthesiologists, which practice dilutes the quality of professional care available to the public. This is evident by the testimony of the director of the operating rooms at the hospital, Mrs. Melvaize Tedeschi, who stated that on the average day there are twelve to thirteen operating rooms in use at one time and only the four physician members of the anesthesiological group working them. (R-513 F.S. at 538).

An additional anti-competitive effect of this tying arrangement is that the patient who is in need of the hospital surgical facilities, has no choice as to the anesthesiologist who will assist in the operation. Moreover, the surgeon performing the operation is faced with the same position in not having a choice as to the anesthesiologist who he will be working with during the surgery. Dr. Charles Eckert, an anesthesiologist in the group of Roux & Associates, testified that a patient should be given the right to choose his anesthesiologist. (R-513 F.S. at 537). Dr. Eckert further testified that his group has been criticized by their peers for acting unethically due to the existing exclusive arrangement.

Another anti-competitive effect here is the artificial price that is charged to most patients for anesthesia services. The evidence presented reflects that many patients are billed for the anesthesia services of an anesthesiologist, when a nurse anesthetist is likely to have performed most of the work associated with the surgery. (R-686 F.2d at 291). In many instances, an anesthesiologist may have had

very little involvement in the operation.

The most important anti-competitive effect of the tying arrangement is the affect on health care. Both Drs. Roux and Eckert testified that they practiced their profession at other hospitals in the New Orleans area. (R-513 F.S. at 537). Not only is this action a violation of the exclusive contract between the anesthesiological group and hospital, but it must have a detrimental effect on the quality of anesthesia services received by the patients in the use of the hospital's surgical facilities. This is supported by the statement of Mrs. Melvaize Tedeschi, the director of the operating rooms at East Jefferson General Hospital, who stated that there are twelve or thirteen operating rooms in use at any one time. (R-513 F.S. at 538). Hence, if some of the anesthesiologists are practicing at other hospitals then it is quite likely that there is a lack of the appropriate professional anesthesiological skills available during surgery in the numerous operating rooms at the hospital. In many instances, the nurse anesthetists perform the majority of the anesthesia services during any particular surgery. (R-686 F.2d at 291). The record reveals that nurse anesthetists have no more than two years of training before they are able to practice; whereas, an anesthesiologist has four or five times the number of years of training. Finally the lack of competition created by this exclusive contract, discourages the anesthesiological group from improving or initiating new techniques and procedures which has a direct bearing on the quality of the health care at the hospital.

The evidence overwhelmingly demonstrates that the tying arrangement between the hospital and the anesthesiological group is illegal per se as all four requirements are easily satisfied.

C. *PROFESSIONAL SERVICES SUBJECT TO SHERMAN ACT SCRUTINY*

In the course of antitrust law, in many legal circles it was believed that professions were exempt from the Sherman Act. However, in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 44 L.Ed.2d 572, 95 S.Ct. 2004 (1975), this Court indicated that indeed professions would be subject to Sherman Act scrutiny. The Court stated:

> We cannot find support for the proposition that Congress intended any such sweeping exclusion. The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public service aspect of professional practice controlling in determining whether Section 1 precludes professions. *United States v. National Association of Real Estate Board*, 339 U.S. 400, 94 L.Ed. 1070, 70 S.Ct. 711. Congress intended to strike as broadly as it could in Section 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose.

However, this Court indicated that an exception was available to professions from coverage under the Sherman Act. (See footnote 17 at p. 787). This exception is based on the distinction between the business or economic aspects and professional service aspects of the particular activity, the former being subject to Sherman Act's scrutiny and the latter not. This view was further clarified by the Seventh Circuit in *Williams v. St. Joseph Hospital*, 629 F.2d 448 (7th Cir. 1980), where the Court stated:

> We are satisfied also that professional services are subject to the antitrust laws. Though the Supreme Court avoided that question in

> *American Medical Association v. U.S.*, 317 U.S. 519, 528, 63 S.Ct. 326, 328, 87 L.Ed. 434 (1943), later cases indicate plainly that with regard to its economic aspects professional activity is subject to the policies of the antitrust laws. *Bates v. State Bar of Arizona*, 433 U.S. 350, 356, 363, 368-72, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

In this matter, the activity by which we are concerned is business in nature. As we discussed previously, the fee for anesthesiological services in a particular year is most likely in excess of $1,000,000. This does not take into consideration the separate fees that are generated by the hospital surgical facilities. Hence, this activity can only be regarded as business oriented or economical in nature.

D. *CONTRACT AS AN UNREASONABLE RESTRAINT OF TRADE*

The jurisprudence interpreting the Sherman Act indicates that even if a complainant fails to meet the standards of per se illegality, he may prevail by proving that the contract unreasonably restrains competition in violation of the more general standards of the act. *Bogus v. American Speech and Hearing Association*, 582 F.2d 277, 287 (3rd Cir. 1978); *Fortner v. U.S. Steel*, 394 U.S. 495, 22 L.Ed.2d 495 (1969). The test to be implied was clearly stated by this Court in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1335 (1978), wherein the court stated:

> The test prescribed in Standard Oil is whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." Unreasonableness under that test could be based either (1) on the nature or character of the contract, or (2)

on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the *inquiry is confined to a consideration of the impact on competitive conditions.*

In this respect the Rule of Reason has remained faithful to its origins. From Justice Brandeis' opinion for the Court in Chicago Board of Trade, supra, the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. "*The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.*"

There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal per se;" in the second category are agreements whose competitive effect can only be evaluated by analysis of the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, *the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.* Subject to exceptions defined by statute, that policy decision has been made by Congress. At p. 684.

Hence, we must consider whether the restraint promotes

competition or creates anti-competitive effects.

As we indicated above, there are several different anti-competitive effects of this exclusive contract between the hospital and the anesthesiological group. These effects create an unreasonable restraint on competition for anesthesiological services. The anti-competitive affects are:

1. There will be no competition in any form in the provision of anesthesiology services at the hospital;

2. The contract discourages new anesthesiologists from entering the market, tending to create a monopoly;

3. The contract restricts the growth of existing anesthesia groups, thereby suppressing intragroup competition;

4. Neither the surgeon nor the patient have a freedom of choice as to the anesthesiologist to assist during the surgery;

5. An artificial price is paid by both third-party insurers and, in some cases, consumers for the services of an anesthesiologist when in many cases the large majority of work is performed by a nurse anesthetist; and

6. The quality of the care being administered to patients is significantly reduced.

In no fashion can the restraining contract be viewed as promoting competition. The inescapable conclusion is that the combination by contract of East Jefferson Hospital and Roux & Associates is an unreasonable restraint of the trade of anesthesiologists.

CONCLUSION

The exclusive contract between the public hospital and the independent professional corporation of anesthesiologists which establishes a closed shop as to independent anesthesiologists and which compels users of the hospital's surgical facilities to retain the anesthesia services of the corporation, creates a tying arrangement that is illegal per se under the Sherman Act. Furthermore, this arrangement is an unreasonable restraint of trade under the rule of reason.

Respectfully submitted,

ADAMS AND REESE

By: _____

HENRY B. ALSOBROOK, JR.
FRANK M. ADKINS
RICHARD B. EASON, II
4500 One Shell Square
New Orleans, LA 70139
Telephone: (504) 581-3234

Counsel for Amicus Curiae
Louisiana State Medical Society

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